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Private Law Remedies, Human Rights, and Supply Contracts

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PRIVATE LAW REMEDIES, HUMAN RIGHTS, AND SUPPLY CONTRACTS

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Implementation of company human rights policies through the supply chain necessarily includes access to the full range of contractual remedies. Many corporations already have corporate human rights policies respecting a wide number of human rights that might be violated in the supply chain, yet having corporate policy is not akin to action. To the extent commercial buyers implement corporate policies in supply chain contracts the contractual obligations are answerable for breach. The Uniform Commercial Code and the UN Convention for the International Sale of Goods provide access to contractual remedies using a market-based remedial framework that would assist in curbing breaches arising from the use of forced or slave labor in international supply chains. This Article provides an overview and analysis of available remedies for breach of a corporate human rights policy implemented in the supply chain. Buyers have access to these remedies either through default or as specifically contracted for remedies, subject to the general notions disfavoring penal damages. The Model Contract Clauses from the American Bar Association's Working Group to Draft Human Rights Protections in International Supply Contracts operate to provide such alternate remedies to buyers implementing human rights policies as contractual supply chain obligations that operate consistently with the existing legal frameworks.

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INTRODUCTION

Implementation of company human rights policies ("CHRPs") through supply contracts necessitates access to remedies. The fulfillment of contractual expectations through remedies is the very foundation of contract law,[1] including transactions subject to Article 2 of the Uniform Commercial Code ("UCC")[2] and the United Nations (UN) Convention for the International Sale of Goods ("CISG").[3] The flexibility of remedies available under Article 2 permits its application in an "infinite" variety of business transactions, customs, and practices, which would presumably

1. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 118 (5th ed. 2011).
2. *See generally* U.C.C. §§ 2-711–2-719 (AM. LAW INST. & UNIF. LAW COMM'N 2011).
3. *See generally* U.N. Convention on Contracts for the International Sale of Goods, art. 74, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG]. This Article will refer to provisions of the UCC and the CISG., but acknowledges that contracting parties may opt-out of the CISG. Nevertheless, this Article will cite to key provisions of the CISG, particularly where the CISG provisions differ from the UCC.

include obligations arising from human rights policies included as part of the contractual obligations in a supply contract.[4]

Despite the work of the UN and the proliferation of CHRPs, there have been continuing instances of human rights concerns in supply contracts. Ongoing problems have led major buyers, including H&M, Walmart, and Gap, to pledge improvement in safety and conditions of workers abroad.[5] The garment industry has not been alone in struggling with human rights concerns abroad; there are also reports of slavery in the fishing industry,[6] child slave labor in the chocolate industry,[7] armed groups benefitting from minerals,[8] and concerns of child labor in tobacco farming[9] that form just part of a long list of continuing and recurring concerns.[10] Some have taken the position

4. *See* Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341, 1341 (1948) (stating that draftsmen of general commercial legislation must consider an "infinite variety of business customs and practices" and that the then-newly proposed UCC covered a variety of different commercial practices).

5. Rachel Abrams, *Retailers like H&M and Walmart Fall Short of Pledges to Overseas Workers*, N.Y. TIMES (May 31, 2016), https://www.nytimes.com/2016/05/31/business/international/top-retailers-fall-short-of-commitments-to-overseas-workers.html.

6. *E.g.*, Ian Urbina, *'Sea Slaves': The Human Misery that Feeds Pets and Livestock*, N.Y. TIMES (July 27, 2015), https://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html (noting that migrants from Cambodia and Myanmar are "sea slaves" on floating Thai labor camps).

7. *See, e.g.*, Brent Kendall, *Supreme Court Denies Nestle, Cargill, ADM Appeal in Slave Labor Case*, WALL ST. J. (Jan. 11, 2016, 1:51 PM), https://www.wsj.com/articles/supreme-court-denies-nestle-cargill-adm-appeal-in-slave-labor-case-1452526492 (documenting a class-action lawsuit regarding forced child slaves who worked on cocoa fields in the Ivory Coast).

8. Joseph Ataman, *EU Agrees on Measures Regulating Conflict Minerals*, WALL ST. J. (June 16, 2016, 2:51 PM), https://www.wsj.com/articles/eu-agrees-on-measures-regulating-conflict-minerals-1466103065.

9. Alexandra Hall, *Working in Tobacco Fields Can Make Kids Sick. But They Still Need the Money*, WASH. POST (Oct. 6, 2016), https://www.washingtonpost.com/lifestyle/magazine/working-in-tobacco-fields-can-make-kids-sick-but-they-still-need-the-money/2016/10/05/fb0892e8-754b-11e6-8149-b8d05321db62.

10. *See generally* Rothna Begum, *"I Was Sold": Abuse and Exploitation of Migrant Domestic Workers in Oman*, HUM. RTS. WATCH (2016), https://www.hrw.org/sites/default/files/report_pdf/oman0716web.pdf; Aruna Kashyap, "*Work Faster or Get Out": Labor Rights Abuses in Cambodia's Garment Industry*, HUM. RTS. WATCH (2015), https://www.hrw.org/report/2015/03/11/work-faster-or-get-out/labor-rights-abuses-cambodias-garment-industry; *see also* ABA, ABA MODEL BUSINESS AND SUPPLIER POLICIES ON LABOR TRAFFICKING AND CHILD LABOR (2014), https://www.americanbar.org/content/dam/aba/administrative/business_law/aba_model_policies.pdf [hereinafter ABA MODEL POLICIES].

that an international convention to combat concerns of human rights abuses in supply contracts is needed.[11]

While there has been consideration of public interventions to combat human rights abuses, there has been little guidance on the right approach to private action and even less guidance on private remedies for human rights abuses, particularly with respect to contracting party behavior that conflicts with a buyer's CHRP incorporated into supply contracts. More specifically, a buyer is generally entitled to a recovery that places it in the position it would have been if full performance had occurred, so long as the recovery is not penal in nature.[12] Yet, it might be questioned whether enforcement of CHRPs mandated in supply contracts can, or even should, be quantified by this type of measure. Tension exists between the remedial object of assuring the non-breaching buyer the "benefit of the bargain" through access to contractual remedies for human rights violations in the supply chain and those who might advocate for greater responsibility for the buyer itself when human rights violations occur in the supply chain.[13]

An example of the relationships (illustrated in Figure 1 below) and the impact private actors can have on the protection of human rights is in order.[14] Suppose a commercial seller and buyer make a long-term supply contract for the purchase of soccer balls at $6 per ball. The buyer,

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11. *Global Treaty 'Only Realistic Way' to Stop Supply Chain Abuse: Rights Group*, REUTERS (May 30, 2016, 10:51 PM), https://www.reuters.com/article/us-labour-regulations-rights/global-treaty-only-realistic-way-to-stop-supply-chain-abuse-rights-group-idUSKCN0YM06P.

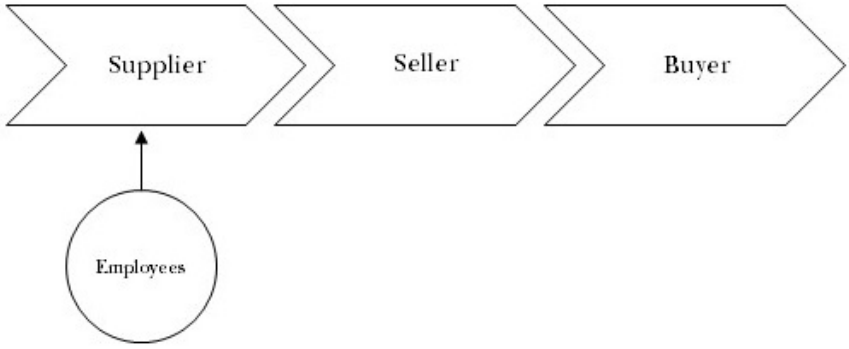
12. U.C.C. § 1-305 (AM. LAW INST. & UNIF. LAW COMM'N 2011); *see also* CISG, *supra* note 3, art. 74 (stating that damages "consist of a sum equal to the loss, including loss of profit").

13. *See generally* Omri Ben-Shahar & Ariel Porat, *The Restoration Remedy in Private Law*, 118 COLUM. L. REV. 1901, 1905–06 (2018) (arguing in favor of a "restoration remedy" to compensate underlying emotional harms); Sarah Dadush, *Identity Harm*, 89 U. COLO. L. REV. 863, 867–68 (2018) [hereinafter Dadush, *Identity Harm*] (arguing in favor of a greater power for consumers to pursue actions for identify harm to aid in corporate accountability); Sarah Dadush, *The Law of Identity Harm*, 96 WASH. U. L. REV. 803, 804 (2019) [hereinafter Dadush, *The Law of Identity Harm*] (arguing that there is a deficit in private law recourse for harm suffered by those who would not ordinarily have access to a remedy).

14. *See* Philip Alston & J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy*, 9 EUR. J. INT'L L. 658, 720 (1998) (explaining the effect of privatization and deregulation on the importance of corporate human rights policies); William Bradford, *Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights*, 26 NOTRE DAME J.L., ETHICS & PUB. POL'Y 141, 156–57 (2012) (noting most major corporations have codes of conduct); David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 953 (2004) (delineating the proliferation of corporate codes of conduct).

located in the United States, has a CHRP as a foundation for all supplier agreements, to which all sellers and their suppliers must adhere, that includes standards for leadership and prohibits labor by those under the age of sixteen.[15] The buyer later discovers that the seller's supplier, located in Pakistan, is employing ball stitchers who are under the age of sixteen years old and as young as ten years old. The buyer faces unfavorable news coverage, lost sales of soccer balls and other sporting equipment, and damage to its reputation due to the use of child labor in its supply chain.[16] While the supplier may assert that views are different about the age of workers locally and the difficulty finding labor near the factory site, the buyer, if the child labor problem remains unresolved, may want to cancel the contract and claim damages.

Figure 1: Relationship of Supply Chain Participants



15. *See, e.g.*, *Nike's Commitment to Human Rights & High Labor Compliance Standards*, NIKE, https://sustainability.nike.com/human-rights (last visited June 1, 2019) ("Nike specifically and directly forbids the use of child labor in facilities contracted to make Nike products."); *see also* Doug Cahn, *Human Rights, Soccer Balls, and Better Business Practices*, CARNEGIE COUNCIL (June 5, 1997), https://www.carnegiecouncil.org/publications/archive/dialogue/1_09/articles/569 (discussing standards Reebok set when entering the soccer ball market).

16. *See generally* Dadush, *The Law of Identity Harm*, *supra* note 13, at 869–70 (discussing consumer lawsuits brought against companies purportedly undertaking human rights protections and arguing that misleading statements to such effect may be the basis for later consumer claims).

In examination of this problem, this Article does not question the comprehensiveness or content of any individual buyer's CHRP, since remedy clauses in supply contracts arguably operate with corporate policies irrespective of the particular content in most cases.[17] Moreover, this Article does not suggest a rewriting of applicable Article 2 provisions at a time when such efforts are not likely to be availing.[18] This Article also does not quibble with those that might argue that some remedy might be justified for identity harm to consumers when buyers make specific, warranty-like promises that the goods sold are CHRP compliant but are not in fact compliant.[19] Rather, this Article proposes that the implementation of CHRPs are furthered by use of a robust set of contract clauses providing access to a permissible set of remedies, whether such remedies are default under the UCC or CISG or in addition to or substitution for the defaults. Moreover, the Model Contract Clauses ("MCCs") from the American Bar Association (ABA) Working Group to Draft Human Rights Protections in International Supply Contracts operate in a permissible manner to enforce the deal that the parties made and permit the buyer to recover its expectation in the event of breach of an included human rights policy.[20]

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17. David V. Snyder & Susan A. Maslow, *Human Rights Protections in International Supply Chains—Protecting Workers and Managing Company Risk*, 73 BUS. LAW. 1093, 1094 (2018) [hereinafter *Model Contract Clauses*] (noting the difference in corporate policies).

18. *See generally Updates, 88th ALI Annual Meeting*, AM. LAW INST., http://2011am.ali.org/updates.cfm (last visited June 1, 2019) (discussing the withdrawal of the 2003 UCC amendments officially in 2011 due to the fact that no state had enacted them in eight years); *see also* David Frisch, *Commercial Law's Complexity*, 18 GEO. MASON L. REV. 245, 247 (2011) (providing an example of a failed revision to the UCC); Gregory E. Maggs, *The Waning Importance of Revisions to U.C.C. Article 2*, 78 NOTRE DAME L. REV. 595, 604 (2003) (explaining that efforts to revise Article 2 have not succeeded throughout the years); Fred H. Miller, *What Can We Learn from the Failed 2003–2005 Amendments to UCC Article 2?*, 52 S. TEX. L. REV. 471, 483 (2011) (stating that there have been no state enactments of the amended UCC Article 2, and as such, it has been withdrawn as the official text); Robert E. Scott, *The Rise and Fall of Article 2*, 62 LA. L. REV. 1009, 1010 (2002) (discussing the end of the "fifteen[-]year effort" to revise Article 2).

19. *See generally* Dadush, *The Law of Identity Harm*, *supra* note 13, at 848–55 (arguing in favor of reparatory damages where goods are sold with "values-integrity" but are non-compliant); *see generally* Sarah Dadush, *Contracting for Human Rights: Looking to Version 2.0 of the ABA Model Contract Clauses*, 68 AM. U. L. REV. 1519 (2019); *see also* U.C.C. § 2-708(2) (AM. LAW INST. & UNIF. LAW COMM'N 2011) (providing for an alternative measure of damages where § 2-708(1) is "inadequate to put the seller in as good a position as performance would have done").

20. *Model Contract Clauses*, *supra* note 17, at 1094 (stating that contractual policies for human rights "have great potential to make a difference when combined with effective remedies for their violation and a willingness to enforce them").

The goal of this Article is not to convince those who prefer greater human rights obligations for commercial buyers that there must be a single set of preferred contract clauses or set of remedies in supply contracts. Instead, those advocating for advancement of human rights should recognize the complicated nature of human rights and that solutions arising from private law initiatives must be both "legally effective and operationally likely."[21] Corporate decision-makers, though, must recognize that a commitment to human rights and stated corporate policies protecting such rights compels the adoption of meaningful provisions in supply contracts implementing the policies. This implementation would undoubtedly include access to non-penal remedies, whether such remedies are default in nature or not.

This Article attempts to guide those endeavoring to craft permissible remedies clauses as part of the implementation of corporate human rights policies in supply contracts. Part I of this Article explores the importance of corporate policy statements on human rights and the relationship of policy and action in supply contracts.[22] Part II begins with a discussion of the generally accepted principle of both default remedies: that an aggrieved party can recover a remedy that is ordinarily non-punitive and based on and limited to an expectation measure of damages.[23] While not fully compensating an aggrieved party for all losses suffered, expectation damages are considered the most appropriate measure of damages in most cases. Part II then demonstrates how default remedies under the UCC and CISG might apply to a breach by a supply chain seller of a contractually obligated CHRP and the limitations on modifications to these default remedies. This Part underscores that contractual damages ordinarily do not provide any type of windfall to an aggrieved party or impose a penalty on the breaching party in the case of human rights abuses contrary to supply contract obligations. Part III examines the remedy provisions contained in the MCCs.[24] This Part provides an analysis of the MCCs that takes into account, to a greater degree, the broader considerations

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21. *Id.* (noting that corporate policy principles "need to be put into practice" and that by placing these terms in contracts, companies can guide the behavior of other parties); *see also* Dadush, *The Law of Identity Harm*, *supra* note 13, at 832–33 (recognizing the "challenges" to holding accountable those selling goods with accompanying "virtuous promises").

22. *See infra* Part I and accompanying text.

23. *See infra* Part II and accompanying text.

24. *See infra* Part III and accompanying text; *see also Model Contract Clauses*, *supra* note 17, ¶¶ 5.1–5.5.

of remedies theory under the UCC, the CISG, and contract law as a whole. Finally, Part IV of this Article argues that use of the MCCs, which provide a wide array of monetary and non-monetary remedies, is consistent with general remedial principles and constitutes an indispensable part of implementation of corporate policy.[25] In doing so, Part IV explains the application of the MCCs in the event of breach by the seller of the CHRP, such that the buyer recovers its expectation but does not profit from human rights abuses and there is no penalty to seller.

I. CORPORATE POLICY STATEMENTS ON HUMAN RIGHTS

The ground rules for contractual remedies take into account the relative standards to which the UCC and CISG hold "performance obligation of . . . sellers," giving an aggrieved buyer expansive rights to remedies that are contingent upon the nature of the transaction at issue and can include incidental and consequential damages.[26] As such, any inquiry into remedies must follow the imposition of a particular contractual obligation, here implementation of a CHRP (which could be a corporate code of conduct, policy, or other principles-related statement) that contains provisions relative to human rights, taking into account that the decision to adopt a CHRP is a voluntary one.[27] The voluntary nature of CHRPs can be contrasted with other non-voluntary matters of corporate governance and oversight that can in some cases trigger liability of even board members for failing to monitor corporate compliance.[28] The availability of

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25. *See infra* Part IV and accompanying text.

26. *See generally* Ellen A. Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 201 (1963) ("The heart of Article 2 is its treatment of the performance obligation of buyers and sellers."). *See* U.C.C. § 2-703 (AM. LAW INST. & UNIF. LAW COMM'N 2011); *see also* CISG, *supra* note 3, art. 74 (damages "consist of a sum equal to the loss, including loss of profit").

27. Dadush, *Identity Harm*, *supra* note 13, at 867 ("[C]orporate and industry commitments to sustainability tend only to be voluntary, and so not legally enforceable."); Mark D. Kielsgard, *Unocal and the Demise of Corporate Neutrality*, 36 CAL. W. INT'L L.J. 185, 185 (2005); *see also* Lucy Amis, *A Guide for Business: How to Develop a Human Rights Policy*, OFF. OF THE U.N. HIGH COMMISSIONER FOR HUM. RTS. 6 (2011), https://www.ohchr.org/Documents/Publications/DevelopHumanRightsPolicy_en.pdf [hereinafter *Global Compact Guide for Business*] (noting that while human rights protection are not a legal treaty duty of business entities, the obligations may have legal obligations arising from domestic law).

28. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967–70 (Del. Ch. 1996) (stating that directors have an obligation to attempt in good faith to have a corporate reporting system, and that failure to do so can result in liability for the director if the director fails to comply with legal standards); *see also* Jennifer Arlen, *The*

contractual remedies, though, turns not on whether there is a governmentally mandated obligation but, rather, on whether the buyer has a corporate policy that includes the protection of human rights and that the buyer has taken the steps to contractually implement the CHRP into practice through supply chain obligations that make the obligations answerable for breach.[29]

It is widely believed that corporate policies, independent of any contractual obligations with outside parties, form an important part of the dialogue between a company and its shareholders and, thereby, enhance profitability.[30] These public statements reflect some type of commitment by the corporation at the highest levels of decision-making to particular standards, presumably with processes in place to carry the policy into action in the day-to-day business operations.[31] Yet, responding to corporate stakeholders with a CHRP does not necessarily entail a commitment to a broad array of human rights protections and does not necessarily represent a commitment to

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Story of Allis-Chalmers, Caremark, *and* Stone*: The Directors' Evolving Duty to Monitor*, *in* CORPORATE LAW STORIES 323, 325–26 (J. Mark Ramseyer ed., 2009) (exploring *Caremark*'s impact on directors' oversight duties); Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 690 (2009) (discussing corporate compliance obligations and *Caremark*); Todd Haugh, *The Criminalization of Compliance*, 92 NOTRE DAME L. REV. 1215, 1229 (2017) (arguing the impact of *Caremark* on corporate compliance functions).

29. *See Global Compact Guide for Business*, *supra* note 27, at 4 ("A human rights policy can take many forms and has no uniform definition."); *see also* Bradford, *supra* note 14, at 158 (asserting that many companies with codes of conduct do not include human rights protections and still others do not abide by their human rights commitments).

30. *See Global Compact Guide for Business*, *supra* note 27, at 12 (urging companies to consult with stakeholders to manage expectations around adopting a human rights policy); Ben DiPietro, *Companies Find Value in Combining Compliance, Sustainability*, WALL ST. J. (May 15, 2018, 10:51 AM), https://blogs.wsj.com/riskandcompliance/2018/05/15/companies-find-value-in-combining-compliance-sustainability/#comments_sector (noting that protecting a company involves coordination of corporate policies and that the regulator may be private in nature); *Robust Governing Practices and Shareholder Dialogue Aid Public Company Performance*, BUS. WIRE (Feb. 25, 2011, 3:09 PM), https://www.businesswire.com/news/home/20110225005872/en/Robust-Governing-Practices-Shareholder-Dialogue-Aid-Public (discussing the Policy Statement on Corporate Government of TIAA-CREF, "one of America's largest institutional investors").

31. *See* U.N. Office of the High Commissioner for Human Rights (OHCHR), *United Nations Guiding Principles on Business and Human Rights*, princ. 16, at 16, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter *UNGPs*] (policy commitments should be approved at the "senior" level of management, be publicly available, and reflected in business policies and procedures); *Global Compact Guide for Business*, *supra* note 27, at 4 (positing that a human rights policy can take many forms but is generally a public statement adopted by a company to respect human rights standards).

enforcing any policy adopted through the supply chain.[32] That is, the CHRP may only "raise awareness" of human rights practices or represent "good business practice," rather than create defined contractual obligations that become part of corporate dealings and become enforceable through remedies in the event of breach.[33]

The role of CHRPs is reflected in the UN Guiding Principles on Business and Human Rights' ("UNGPs") direction that business enterprises should have publicly available company policy statements protecting human rights.[34] Efforts toward enhancing business responsibility has led to the proliferation of CHRPs,[35] industry association initiatives,[36] and a consensus that "[b]usinesses should support and respect the protection of internationally proclaimed human rights."[37] The efforts of the ABA yielded the ABA Model Business and Supplier

32. *See Global Compact Guide for Business*, *supra* note 27, at 7–8 (stating that companies may have human rights protections for various reasons).

33. *See id.* at 8 (outlining various reasons why a company may choose to implement a human rights policy).

34. *UNGPs*, *supra* note 31.

35. *See* Bradford, *supra* note 14, at 156–57; *see also* Christopher P. Skroupa, *Human Rights—A Growing Risk for Companies Doing Business in Tough Places*, FORBES (June 10, 2016, 8:54 AM), https://www.forbes.com/sites/christopherskroupa/2016/06/10/human-rights-a-growing-risk-for-companies-doing-business-in-tough-places ("We are also going to see far more human rights-related pressure from courts and investors across the world space . . . . Such legislation will force companies to say something about what they are doing for human rights.").

36. *See, e.g.*, *About the International Cocoa Initiative*, INT'L COCOA INITIATIVE, https://cocoainitiative.org/about-ici/about-us (last visited June 1, 2019) (stating that the initiative "promotes child protection in cocoa-growing communities"); RESPONSIBLE BUS. ALLIANCE, http://www.responsiblebusiness.org (last visited June 1, 2019) (noting that the organization is "dedicated to corporate social responsibility in global supply chains").

37. *The Ten Principles of the UN Global Compact*, U.N. GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles (last visited June 1, 2019) [hereinafter *Principles of the UN Global Compact*] (quoting Principle 1, concerning business support for human rights). The UN Global Compact is a voluntary initiative that has more than 13,000 members, including large multinational companies, such as The Coca-Cola Company, Gap Inc., General Electric, General Mills, General Motors, and Nike, Inc. *See Our Participants*, U.N. GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/participants/search?utf8=%E2%9C%93&search%5Bkeywords%5D=&search%5Bsort_field%5D=joined_on&search%5Bsort_direction%5D=asc (last visited June 1, 2019) (use "Search Participants" field to enter The Coca-Cola Company, Gap Inc., General Electric, General Mills, General Motors, and Nike, Inc.).

Principles on Labor Trafficking and Child Labor.[38] Yet, is the existence of CHRPs alone equivalent to positive action protecting human rights, or should companies take additional steps toward implementation?[39] Should implementation include imposing obligations outside its own business structure, including in supply chain contracts?

While many companies have CHRPs, the nature of the policies vary to a wide degree with no particular agreement overall as to the breadth of the expectations that should form the basis for later contractual obligation.[40] Some CHRPs are brief and unsophisticated in coverage, making it less likely to form the basis of a defined contractual obligation with business partners.[41] Moreover, the particular rights addressed in any particular CHRP are likely to reflect differing business lines and priorities such that obligations might not necessarily be broadly defined across industries.[42] That said, many CHRPs reflect a common set of rights and principles,[43] such as those set forth in the Universal Declaration on Human Rights,[44] UNGPs,[45] and the ABA Model Business and Supplier Policies on Labor Trafficking and Child

38. There are both ABA Model Business and Supplier Principles on Labor Trafficking and Child Labor ("ABA Model Principles") and ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor ("Model Policies"). The ABA Model Principles are the high-level articulation of the detailed material in the Model Policies. The ABA Model Principles also form Part II of the Model Policies. Only the ABA Model Principles were adopted by the ABA House of Delegates, so only the ABA Model Principles represent the official position of the American Bar Association. For a detailed discussion, see E. Christopher Johnson, Jr., *Business Lawyers Are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor*, 70 BUS. LAW. 1083 (2015); *see also ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor: The Working Group*, ABA (Jan. 9, 2019), http://www.americanbar.org/groups/business_law/initiatives_awards/child_labor.

39. *UNGPs*, *supra* note 31, at 1 (citing the "need for rights and obligations to be matched to appropriate and effective remedies when breached").

40. *See Global Compact Guide for Business*, *supra* note 27, at 4.

41. *See id.* (describing a process that might change policy statements as corporate buy-in increases).

42. *See id.* at 12–16.

43. *See, e.g.*, *UNGPs*, *supra* note 31, princ. 12 ("The responsibility of business enterprises to respect human rights refers to internationally recognized human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work."); ABA MODEL POLICIES, *supra* note 10.

44. G.A. Res. 217 (III) A, Universal Declaration of Human Rights 71 (Dec. 10, 1948) (providing "inalienable rights of all members" of society).

45. *UNGPs*, *supra* note 31, princ. 11 (recognizing the responsibility of business entities in promoting human rights).

Labor.[46] Typically, the human rights identified in CHRPs include, at a minimum, protections against labor trafficking and child labor.[47]

Even where a CHRP is in place, not all policies are integrated into corporate business relationships such that they might form part of contractual obligations created and be the basis for contractual remedies.[48] Yet, to stand aside in the face of exterior human rights abuses without implementing existing policy in business relationships can amount to being complicit in the human rights abuses of others.[49] Intervention, though, might necessitate a buyer to compel particular supplier behavior where there is indirect control, at most.[50] An approach whereby well-developed CHRPs are part of the corporate standards widely paves the way for integration through supply contracts and implications for failure to act in accordance with stated policy.[51]

A "remediation policy and plan" that implements a CHRP necessarily includes both prohibitions of abuses and mechanisms with respect to remediation.[52] With respect to supply contracts, this inevitably includes protections in supply contracts, presumably through incorporation of the CHRP as part of the contractual

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46. ABA MODEL POLICIES, *supra* note 10.

47. *See, e.g.*, *id.* princ. 1; *see also UNGPs*, *supra* note 31, princ. 12 ("[S]ome human rights may be at greater risk than others in particular industries or contexts . . . ."); *Global Compact Guide for Business*, *supra* note 27, at 19–21 (identifying human rights areas commonly covered to include non-discrimination, equality, child labor, forced labor, freedom of association, health and safety, working conditions, wages, harassment, people with disabilities, maternity protection, and right to strike).

48. *See UNGPs*, *supra* note 31, princ. 19, at 20–21 (directing "appropriate action" to mitigate human rights abuses, considering the leverage that the business may have to address the impact); *Global Compact Guide for Business*, *supra* note 27, at 14 (stating that a company may choose to have a "stand-alone" statement on human rights without incorporating it into the larger corporate policy scheme).

49. *See UNGPs*, *supra* note 31, princ. 19, at 20–21 (explaining that businesses should have policies but also processes for remediation).

50. *See, e.g.*, ABA MODEL POLICIES, *supra* note 10, princ. 4, at 4 (discussing how business should have a remediation policy and plan); *see also UNGPs*, *supra* note 31, princ. 19, at 20–22 ("Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.").

51. *See UNGPs*, *supra* note 31, princ. 19, at 21–22 (noting the complexity where the impact is linked to the business through a relationship with another entity); *Global Compact Guide for Business*, *supra* note 27, at 14, 24–25.

52. *See, e.g.*, *UNGPs*, *supra* note 31, princ. 19, at 20–22 (leverage may include terminating business relationships or other means to mitigate adverse harms); ABA MODEL POLICIES, *supra* note 10, princs. 1, 4, at 4; *see also Global Compact Guide for Business*, *supra* note 27, at 25.

representations and warranties and implications for non-adherence.[53] To the extent the CHRP, irrespective of breadth of coverage, is included as part of the supply contract obligations as part of the implementation of the CHRP, recourse to permissible contractual remedies compensates the buyer and becomes a part, though arguably not all, of a remediation plan in the event of breach.

II. BUYER'S DEFAULT REMEDIES

In general, the UCC and CISG work alongside the common law of contracts unless displaced by its provisions, including principles of law and equity.[54] It is for this reason that well understood principles of remedies, particularly the theories underlying them, would play a role in remedies awarded to a non-breaching business enterprise seeking to enforce an agreed to CHRP breached by a supplier.[55] While an aggrieved buyer is entitled to collect its expectation interest related to the performance of the CHRP,[56] it does not follow that the aggrieved buyer has uninhibited reign with respect to imposing liability on the breaching seller.[57] This premise holds true irrespective of how admirable and important it might be to protect vulnerable parties.

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53. *Global Compact Guide for Business*, *supra* note 27, at 24–25.

54. U.C.C. § 1-103(b) (AM. LAW INST. & UNIF. LAW COMM'N 2011) ("Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions."); *see also* CISG, *supra* note 3, art. 7(2) ("[M]atters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable . . . ."); Robyn L. Meadows, *Code Arrogance and Displacement of Common Law and Equity: A Defense of Section 1-103 of the Uniform Commercial Code*, 54 SMU L. REV. 535, 537–38 (2001) ("[M]any commercial disputes cannot be decided without resort to common law and equity.").

55. *See generally* MURRAY, *supra* note 1, § 118[D][6] (discussing that the remedies under the UCC are a "combination of traditional contract remedies and the creativity of . . . Karl Llewellyn").

56. U.C.C. § 2-703; *see* CISG, *supra* note 3, art. 74; *see also* CISG Advisory Council Opinion No. 6, Calculation of Damages Under CISG Article 74, op. 9 (2006), http://cisgw3.law.pace.edu/cisg/CISG-AC-op6.html ("Damages must not place the aggrieved party in a better position than it would have enjoyed if the contract had been properly performed.").

57. U.C.C. § 2-703; *see also* CISG, *supra* note 3, art. 6 (allowing parties to vary the default provisions). *But see* CISG Advisory Council Opinion No. 10, Agreed Sums Payable upon Breach of an Obligation in CISG Contracts, cmt. 3.3 (2012), http://www.cisg.law.pace.edu/cisg/CISG-AC-op10.html ("domestic protection mechanisms" apply "to agreed sums in CISG contracts").

The basic principles that achieve balance in terms of fairness at common law, including certainty, foreseeability, and mitigation, apply to prevent overcompensation.[58]

With that in mind, the provisions for remedies for commercial transactions that would be applicable to a hypothetical dispute involving a breach of the soccer ball stitching human rights obligations, are contained in Part 7 of Article 2 and Articles 45–50 and 74–77 of the CISG.[59] The primary ground rules for a buyer's damages depend upon whether the parties' dispute is subject to the default remedial provisions or whether the parties have modified, limited, or liquidated damages by agreement.[60]

In an observation more than fifty years ago, then Professor Ellen Peters—later a Connecticut Supreme Court Chief Justice—noted with respect to Article 2 of the UCC, the difficulty of imposing greater liability on a seller than default rules provide:

> The buyer . . . will find little more that he can do by contract to enhance his damages in the event of seller's nonperformance. Of course he can extract high performance standards, and multiple and diverse express warranties. Beyond that, he may communicate information about possible business losses to be expected in the event of default. And possibly he may be able to draft a generously compensatory liquidated damages clause. It is interesting that there is no equivalent on the buyer's side to the seller's guarantee of minimal recovery from a defaulting buyer who has made a down payment. And none of the statutory suggestions of 2-719, except its permission to "alter" the measure of damages, are relevant to increase the seller's liability.[61]

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58. U.C.C. § 1-305. Comment 1 states: "The second [proposition of § 1-305] is to make it clear that compensatory damages are limited to compensation. They do not include consequential or special damages, or penal damages; and the Uniform Commercial Code elsewhere makes it clear that damages must be minimized." *Id.* cmt. 1; *see also* CISG, *supra* note 3, art. 77 (stating that parties must take "reasonable" measures "to mitigate the loss"); CISG Advisory Council Opinion No. 6, *supra* note 56, cmt. 2 (stating that damages do not have to be proved with "mathematical precision" and mitigation applies).

59. *See generally* U.C.C. § 2-711 (buyer's remedies in general); CISG, *supra* note 3, art. 74–77. With respect to the CISG, many of the remedies are analogous or even identical to that of Article 2, primarily focusing on suspending performance, specific performance, avoidance of contract, cover damages, expectation damages, including consequential damages, price reductions, and damages for partial non-delivery. As such, this Article may not always reference the CISG's remedial provisions directly unless there is a distinction from the UCC or where otherwise helpful.

60. *See* Peters, *supra* note 26, at 280 (noting the "opportunity" for parties to "diverg[e] from statutory calculation of damages").

61. *See id.* at 283.

Bearing in mind the difficulty in broadening the obligations of sellers, this section will explore how Article 2 (and to an extent, the CISG) might apply to a dispute involving a breach by a supply chain seller of a buyer's corporate policy that commits to protections of human rights.

A. Evaluation of Remedies Under Default Rules

In the event that a buyer implements a CHRP in the supply chain but does not include particular provisions relative to remedies akin to those set forth in the MCCs, default remedy provisions apply.[62] Default remedy provisions under Article 2 fall into two categories, which depends on whether the buyer has accepted the goods or not,[63] while the CISG's provisions generally provide for recovery for "loss."[64] Article 2's paths lead to a menu of monetary remedies with respect to non-accepted goods (as well as remedies to obtain the goods themselves) under section 2-711,[65] and monetary remedies with respect to accepted goods under section 2-714.[66] Moreover, "remedies [are] to be liberally administered . . . unless a different effect is specifically prescribed."[67] Accordingly, an aggrieved buyer should have access to a number of default remedies for loss relative to the goods in question in the event that the buyer discovers the breach of the CHRP.

Often times, though, the remedy for breach of a buyer's contractually obligated CHRP will be in large part based on a claim of consequential

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62. U.C.C. § 2-102 (explaining that Article 2 applies to transactions in goods).

63. *Id.* § 2-711 cmt. 1; *see also* CISG, *supra* note 3, art. 74 ("Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."); Peters, *supra* note 26, at 254 (explaining that U.C.C. 2-711(1) requires that the buyer make out a case for rejection or revocation of acceptance, otherwise U.C.C. 2-714 governs and measures damages differently).

64. *See* CISG., *supra* note 3, art. 74; CISG Advisory Council Opinion No. 6, *supra* note 56, cmts. 2.3, 2.7 (detailing losses recoverable).

65. U.C.C. § 2-711 cmt. 1 (explaining that "[t]o index in this section the buyer's remedies," the provision permits recovery of money and the right to cover).

66. *Id.* § 2-714 (stating that the buyer's recovery is based upon difference in value along with incidental and consequential damages); *see also* David Frisch, *The Compensation Myth and U.C.C. Section 2-713*, 80 BROOK. L. REV. 173, 179 (2014) (describing Article 2 as "exceptional among statutory regimes by not prescribing a general standard of recovery for the aggrieved party, but instead employing specific formulas for computing damages").

67. U.C.C. § 2-711 cmt. 3.

damages.[68] For instance, consequential damages would include those arising from lost business and reputation if it were discovered, in our earlier hypothetical, that children stitched the company's soccer balls, particularly if the use of child labor was pervasive. While the commentary makes clear that the buyer does not have to prove these reputational and related consequential damages with "certainty" or "mathematical precision," the buyer retains the proof of loss, making recovery for reputational damages challenging.[69] Further complicating recovery of consequential damages in the event of breach of a CHRP is that there is an expectation of some aspect of mitigation by specifying that buyers may only collect consequential damages, "which could not reasonably be prevented by cover or otherwise."[70]

How to prove and mitigate reputational and lost sales damages due to breach of a contractually operative CHRP may be a formidable task in a market of "conscious consumerism" where "consumers are increasingly willing to pay a premium for goods sold by companies whose . . . values align with their own."[71] The implication is that the buyer who is deemed less-virtuous will have a worse reputation and be relegated to a lower market price, as well as potentially being exposed to consumer lawsuits.[72] Yet, proving a supply chain buyer's consequential damage from breach of a CHRP by a supplier in any "reasonable" measure will surely be daunting.[73] Moreover, discovery that children stitched the soccer balls raises considerations of what type of mitigation is required to preserve a supply chain buyer's ability to claim consequential damages. Prevention of consequential damages by

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68. *Id.* § 2-715(2); CISG Advisory Council Opinion No. 6, *supra* note 56, op. 3 (explaining that lost profits and other losses are recoverable).

69. U.C.C. § 2-715 cmt. 4; CISG Advisory Council Opinion No. 6, *supra* note 56, op. 3.

70. U.C.C. § 2-715(2)(a); *see id.* cmt. 2 (explaining that "the older rule at common law which made the seller liable for all consequential damages of which he had 'reason to know' in advance is followed, the liberality of that rule is modified by refusing to permit recovery unless the buyer could not reasonably have prevented the loss by cover or otherwise"). Like Article 2, the CISG also contains a requirement to mitigate damages in Article 74. *See* CISG Advisory Council Opinion No. 6, *supra* note 56, op. 4 (stating that the costs of mitigation are recoverable).

71. Dadush, *Identity Harm*, *supra* note 13, at 869–70.

72. *See id.* ("A year-over-year analysis found that sales of goods marketed as promoting socially conscious business practices outpaced sales of brands without such claims by a factor of five.").

73. U.C.C. § 2-715 cmt. 4.

"cover or otherwise"[74] could simply require the buyer to procure replacement soccer balls but could also theoretically lead to expectations that mitigation might include some form of reparations for the harm to the employees, the child stitchers.[75]

While the default rules of Article 2 and the CISG include the right of an aggrieved buyer to "cancel" or "avoid" the contract,[76] cancellation is not available for all breaches. In particular, cancellation is limited if the supply contract is an installment contract.[77] Often times, the supply contract at issue is one with delivery of goods in lots,[78] making it an installment contract. If so, access to a cancellation remedy in the event of a breach of a CHRP would turn not on the likelihood of future human rights abuses, but on the significance of the breach.[79]

So, a buyer may face the prospect of desiring cancellation for some conduct prohibited by the supply contract, yet not have clear direction about when it may justifiably cancel under the default provisions.[80] Some breaches of a CHRP might fall within this standard of "substantial impairment"[81] of the whole contract or "fundamental breach"[82] where

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74. *Id.* § 2-715(2)(a); *see also* § 2-712(1) ("After a breach . . . the buyer may 'cover' by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.").

75. *See* Dadush, *Identity Harm*, *supra* note 13, at 864–68, 933 (arguing that remedies for violations of a corporation's promise to sustainably source goods are currently limited, but should include injunctive relief, replacement of goods, and fulfillment of a corporation's promise to consumers).

76. U.C.C. § 2-711; *see also* CISG, *supra* note 3, art. 49 (finding avoidance where there is a "fundamental breach" of the contract).

77. *See* U.C.C. § 2-612 (defining "installment contract" as "one which requires or authorizes the delivery of goods in separate lots"); *see also* Peters, *supra* note 26, at 223 (explaining that the right to cancel is modified when there is an installment contract). Moreover, section 2-612 arguably limits the perfect tender rule of section 2-601 with respect to installment contracts, thereby limiting the buyer's right to even reject goods. *Id.* at 224–25.

78. See U.C.C. § 2-105(5) (defining lot to mean "a parcel . . . which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract").

79. *See id.* § 2-612(3) (stating that in the event the buyer accepts a non-conforming shipment without calling for cancellation, the buyer reinstates the contract); *see also* CISG, *supra* note 3, art. 73(2) ("If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.").

80. *See* Peters, *supra* note 26, at 225 (noting "[t]he section is reasonably clear at the extremes," such as when the breach is "trivial and curable").

81. See U.C.C. § 2-612(3).

82. See CISG, *supra* note 3, art. 73(1).

the human rights abuses by the supply chain seller constituting the breach are of a particularly serious nature and remain uncured, perhaps due to a pervasive and uncured stitching of soccer balls by twelve-year-old children.[83] The buyer may face difficulty determining if cancellation is permitted due to the absence of a readily available right to cancellation the nature of the non-compliance by the supplier.[84] The buyer may still be able to cancel an installment contract if the breach arises, for instance, from the twelve-year-old ball stitcher where the parties discover the problem and the supplier cures by removing the worker from the supply chain, but this is not clear.[85] Even where the buyer believes it is justified in calling for cancellation, the seller may well challenge the cancellation as not resulting in the requisite impairment of the contract as a whole, even where human rights abuses persist.[86]

In sum, if a buyer has implemented its CHRP contractually through its supply chain, the default remedies provide a range of remedies that are primarily market-based in nature. Unfortunately, the market-based remedy will likely only solve part of the buyer's damages, leaving access to consequential damages necessary to fulfill an aggrieved buyer's expectation. The proof and mitigation requirements for these damages, though, may prove troublesome for buyers even if the supplier seller can pay them, which is not necessarily the case. Moreover, while cancellation is available under the UCC and CISG the remedy is not readily available as a default remedy if the contract is an installment contract. With this background on the limitations of default remedies, the next section will explore the extent to which the parties can contractually modify damages to address these challenges.

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83. A buyer would be able to reject the goods and cancel the contract where there are "incurable substantial defects or for substantial defects in which the seller does not promptly promise to cure." Peters, *supra* note 26, at 226–27.

84. *See id.* at 226 (describing various circumstances where it is unclear if the buyer may cancel, such as when "the defect is trivial and uncurable" or "trivial, curable, but not cured").

85. *See id.* at 227 (noting that cancellation in this type of substantial defect that is uncured is "unclear," but suggesting that cure should not be permitted for substantial defects that impair the whole contract due to the "omission" of cure from subsection (3)).

86. *See* U.C.C. § 2-612 cmt. 6 (noting the buyer's entitlement to cancellation turns "not on whether such non-conformity indicates an intent or likelihood that the future deliveries will also be defective, but whether the non-conformity substantially impairs the value of the whole contract"); *see also* Peters, *supra* note 26, at 227 (noting the lack of "sufficient certainty" as to some of the applications of cancellation in section 2-612).

B. Modifications of Buyer Remedies

In light of the challenges to asserting the default remedies facing the hypothetical buyer of soccer balls from a supplier that used child labor for stitching, the buyer should consider a robust set of alternative remedies prescribed in the supply contract. The MCCs seek to provide such a slate of remedies in addition to and in substitution of Article 2 and CISG remedies, whichever may be applicable, drafted in a buyer-friendly manner.[87]

Importantly, parties retain broad discretion to shape their remedies, as both Article 2 and the CISG permit parties to vary from the default remedies.[88] This would include both modifying or limiting remedies as well as agreements liquidating remedies.[89] Yet, the overall remedial policy remains one toward compensating aggrieved parties only to the extent of full recovery reflecting full performance of the transaction.[90] Importantly, agreed remedies that might be viewed as a penalty are routinely rejected as void.[91] Thus, the operative provisions appear to favor a buyer recovery aimed toward a limited recovery by buyers of the loss actually suffered as reflected by a measure approximating full contractual performance.

With this in mind, the buyer, knowing the difficulties it might face in the event of a breach of a CHRP implemented in the supply chain, might

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87. *See Model Contract Clauses*, *supra* note 17, ¶¶ 5.1–5.5 (permitting the buyer to suspend payments to supplier, get damages, and return, destroy, or donate a Seller's goods, among other remedial measures); *see also infra* Part III (describing the remedies under the ABA MCCs and the difficulty for an aggrieved buyer to access all available damages).

88. *See* U.C.C. § 2-719 cmt. 1 (asserting that parties are "free to shape their remedies to their particular requirements"); CISG, *supra* note 3, art. 6 (permitting parties to derogate from any of the Convention's provisions); *see also* CISG Advisory Council Opinion No. 10, *supra* note 57, op. 2 ("[T]he parties may derogate from [CISG] Articles 74–79 . . . .").

89. *See* U.C.C. § 2-718 cmt. 1 (permitting liquidated damage clauses where "the amount involved is reasonable in the light of the circumstances of the case"); *see also* CISG Advisory Council Opinion No. 6, *supra* note 56, cmt. 1.3 (permitting parties to "include a liquidated damages provision, which provides for a specified amount of damages to be paid by a party who repudiates the agreement").

90. *See* U.C.C. § 1-305 cmt. 1 (specifying that this provision is intended to "make it clear that compensatory damages are limited to compensation"); *see* CISG., *supra* note 3, art. 74 (providing damages to the aggrieved party for the "sum equal to the loss"); *see also* CISG Advisory Council Opinion No. 6, *supra* note 56, op. 9 ("Damages must not place the aggrieved party in a better position than it would have enjoyed if the contract had been properly performed.").

91. *See* U.C.C. § 1-305(a) (prohibiting consequential, special, and penal damages "except as specifically provided" in the UCC or "other rule of law"); *see also* CISG Advisory Council Opinion No. 10, *supra* note 57, cmt. 4.2.2. (assessing the prohibition on penalties in light of "what is reasonable in international trade").

contract for a modification of remedies, such as those in the MCCs, but likely lacks significant tools to "enhance his damages in the event of seller's nonperformance" and is not "guarantee[d] [any] minimal recovery."[92] These impediments to modifying default remedies would still apply irrespective of the importance of the CHRP to the buyer, who might have a zero-tolerance position as to the CHRP. As Professor Peters noted, however, despite these parameters, the buyer might still use alternative remedy provisions that "communicate information about possible business losses to be expected in the event of"[93] breach of a CHRP.

In addition to the flexibility to modify the default remedies, contracting parties have flexibility to liquidate damages by a sum certain or formula.[94] While the UCC's abhorrence of penalties is clear,[95] the CISG does not outright prohibit liquidated damages clauses that are penal in nature, leaving "reasonableness" of such clauses to what is "reasonable in international trade."[96] Any approach to crafting liquidated remedies for breach of a CHRP, though, must not fail to take into account these potential limitations on liquidated damages, irrespective of whether the contract involves matters of societal importance, such as human rights. While a large liquidated damages clause would surely deter breaches of a CHRP, it is hard to advocate for such an interpretation that would likely face challenge under either Article 2 or the CISG.[97]

The next Part of this Article will explore how the remedies provisions of the MCCs address the issues raised under the default remedies of the UCC and CISG. It proceeds by identifying the key areas covered in the MCCs and then providing an assessment of whether the provisions operate in a permissible manner in shaping party expectations regarding available remedies in the event of a breach.

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92. Peters, *supra* note 26, at 283.

93. *Id.*

94. *See* U.C.C. § 2-718(1) ("Damages for breach by either party may be liquidated in the agreement" for a reasonable amount); *see also* CISG, *supra* note 3, art. 6 (permitting parties to derogate from any of the provisions of the Convention); CISG Advisory Council Opinion No. 10, *supra* note 57, cmt. 2 ("[T]he parties may derogate from Articles 74–79 . . . .").

95. *See* U.C.C. § 1-305(a) (emphasizing that penal damages cannot be awarded); *see id.* § 2-718(1) (stating that liquidated damages that are unreasonably large are "void as a penalty").

96. CISG Advisory Council Opinion No. 10, *supra* note 57, cmt. 4.2.2.

97. *See supra* notes 88–96 and accompanying text.

III. THE MCCS PROVIDE A FRAMEWORK OF PERMISSIBLE REMEDIES

Framed by the accepted attributes of the expectation interest, commercial default remedies attempt not to undercompensate or overcompensate an aggrieved buyer. In fact, the default remedies provide a market-based recovery to an aggrieved buyer that attempts to protect an expectation measure. Yet, the default remedies present challenges with respect to the extent to which an aggrieved buyer facing a supplier in breach of a CHRP can successfully access the full range of allowable general and consequential damages, particularly with respect to foreseeability, mitigation, and proof issues.[98] As discussed above, an aggrieved buyer is entitled to be placed in the position of full contractual performance without augmentation to the buyer or, arguably, penalty to the breaching seller. There is little leeway toward contracting to put the buyer in a better position than full contractual performance, or to impose a penalty on the seller.[99]

Thus, where the parties agree to alter the default remedies, any such modification is still subject to this "expectation cap" for violation of a CHRP by those in the supply chain. The aim of the MCCs, then, cannot be to "enhance" the buyer's damages, but rather to "communicate information about possible business losses" and provide the buyer with monetary and non-monetary tools toward mitigation and recovery.[100] This section will examine the MCCs on remedies and evaluate the treatment of the particular problems arising from breaches of CHRPs in the supply chain.

A. Non-compensatory Remedies are Consistent with Principles of Law and Equity

The MCCs[101] generally provide that all remedies are "cumulative" and "without prejudice to, any other remedies provided at law or in equity."[102]

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98. *See supra* notes 68–86 and accompanying text.

99. *See supra* notes 90–91 and accompanying text.

100. Peters, *supra* note 26, at 283.

101. The drafters of the MCCs acknowledged that the particular human rights obligations addressed by any particular CHRP may differ, providing for the inclusion of the CHRP as "Schedule P." *See Model Contract Clauses*, *supra* note 17, at 1096 n.13 ("The letter 'P' was chosen [for] the schedule" to correspond with "'Principles' or 'Policies.'"). Accordingly, the provisions on remedies at times reference the Schedule P. It is also notable that the ABA MCCs are "buyer-friendly" provisions and in some cases "could be perceived by some suppliers as unduly aggressive," such that adjustment or elimination may be warranted in negotiations. *Id.* at 1096–97.

102. *Id.* ¶ 5.3.

The MCCs[103] provide for a number of non-compensatory remedies in equity upon breach of a CHRP, including: (1) validating demands for adequate assurances;[104] (2) obtaining injunctive relief;[105] (3) requiring the seller to remove employees;[106] (4) requiring the seller to terminate subcontracts;[107] and (5) suspending payments during investigation[108] until remediation of the violation of the CHRP. Notably, the MCCs make clear that a buyer may decline to avail itself of all remedies, which is particularly critical while the parties are working collectively to remedy CHRP violations, but such action is not a waiver of its rights.[109] Similarly, the buyer has a flexible right to cancel part or all of the agreement.[110]

These alterations to the default remedies do not deviate in any meaningful way from the type of damages expressly provided for or seemingly allowable as the "parties are left free to shape their remedies to their particular requirements."[111] It is worth noting that some of the MCC remedial provisions help a buyer to use its leverage to remediate human rights abuses in the supply chain, as well as to "communicate information about possible business losses."[112]

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103. The ABA MCCs "reflect" the remedies applicable to trafficking in persons by entities contracting with the U.S. government where the contract has an estimated value exceeding $500,000. FAR § 52.222–50(h)(1)(ii) (2018); *Model Contract Clauses*, *supra* note 17, ¶ 5.3, at 1103 n.39.

104. *Model Contract Clauses*, *supra* note 17, ¶ 5.3(a).

105. *See id.* ¶ 5.3(b) (providing that noncompliance with the CHRP "causes Buyer great and irreparable harm for which Buyer has no adequate remedy at law and that the public interest would be served by injunctive and other equitable relief").

106. *Id.* ¶ 5.3(c) (extending the provision to "employee[s]" and "Representative[s]" of the seller).

107. *Id.* ¶ 5.3(d).

108. *Id.* ¶¶ 5.2, 5.3(e). Inclusion of clause 5.2 in a supply contract may be advisable generally, but the contract should have specific application when payment is to be made by letter of credit. *Id.* ¶ 5.2.

109. *See id.* ¶ 5.3 ("Buyer's exercise of remedies and the timing thereof shall not be construed in any circumstance as constituting a waiver of its rights under this Agreement.").

110. *Id.* ¶ 5.3.

111. U.C.C. § 2-719 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 2011); *see also* CISG, *supra* note 3, art. 6 (providing wide discretion to vary default rules); CISG Advisory Council Opinion No. 10, *supra* note 57, cmt. 2 (relying on the freedom of contract to permit parties to derogate from the rules).

112. Peters, *supra* note 26, at 283; *see* U.C.C. § 2-612(2) (permitting the buyer to reject "any installment which is non-conforming" if it "substantially impairs the value of that installment and cannot be cured"; *see also* CISG, *supra* note 3, art. 73(1) (permitting a party to declare a contract avoided "if the failure of one party to perform any of his obligations . . . constitutes a fundamental breach of contract").

1. Buyers should have recourse to cancellation

The right to cancellation is a typical remedy generally provided to both buyers and sellers alike under applicable default rules.[113] Specifically, permitting a buyer the right of cancellation for breach of a CHRP may be, in some cases, an alteration of the default remedies due to the "restrictive treatment" for cancellation of installment contracts.[114] Yet, the MCCs inclusion of an express termination clause[115] does not provide access to a remedy that is not otherwise permitted generally or for installment contracts specifically.

Inclusion of a cancellation clause of the type employed in the MCCs[116] will permit a buyer to circumvent the "ambiguity" of whether a breach of a CHRP in an ongoing supply contract permits recourse to cancellation under the "substantial impairment" and "fundamental breach" standards.[117] While cancellation of a supply contract may not be the preferred choice of a buyer in need of the goods, recourse to cancellation is justified. The UNGPs make clear that "appropriate action" in response to a human rights impact may include termination but that "ending the relationship" is not always the best response.[118] Because the question of cancellation of installment contracts does not turn on the likelihood of future breaches of the CHRP or the impact of collaboration with the supplier, buyers will want to have access to a clear right to termination if other remediation measures prove unsuccessful.

The MCCs provide access to additional meaningful equitable measures short of cancellation that include providing the buyer with the authority to require the seller remove employees[119] or terminate

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113. U.C.C. §§ 2-703(f), 2-711(1).

114. Peters, *supra* note 26, at 224; *see supra* notes 76–86 and accompanying text (discussing the buyer's lack of direction on how to cancel an installment contract in the event of a breach).

115. *Model Contract Clauses*, *supra* note 17, ¶ 5.3.

116. *Id.*

117. *See* CISG, *supra* note 3, art. 73 (noting a party may declare a contract avoided if a fundamental breach occurs); Peters, *supra* note 26, at 225 (noting section 2-612 is "reasonably clear at the extremes"); *see also supra* notes 76–86 and accompanying text.

118. *UNGPs*, *supra* note 31, princ. 19 & cmt., at 20–22. The commentary explains: "There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so." *Id.*

119. *See Model Contract Clauses*, *supra* note 17, ¶ 5.3(c) (extending the provision to "employees" and "representatives" of the seller).

subcontracts.[120] Exercise of such "leverage" in the business relationship with respect to employees and subcontracts may permit the parties to continue the contractual relationship in the face of CHRP violations by removing employees or subcontractors that are at the root cause of the abuses.[121] Moreover, these clauses may permit businesses to "prevent and mitigate" human rights impacts arising from breach of the CHRP at an early point in the relationship, particularly where waiting may make the human rights impacts irremediable.[122] Recognizing that cancellation of the supply contract in the event of a breach of a CHRP may have other business and human rights impacts,[123] a buyer's contractual access to cancellation of a subcontract or removal of employees and subcontractors as provided in the MCCs becomes especially important tools to "cease or prevent the impact."[124]

2. Working with a breaching supplier should not constitute a waiver of the buyer's rights

Installment contracts also raise issues concerning waiver when parties continue performance of the installment contract in the presence of a breach of the CHRP, rather than, for instance, cancelling when permitted.[125] A supplier's continued breach of CHRP obligations would not be "washed out" due to the buyer's earlier acceptance of goods, so that the breaches can be cumulative in nature as to the whole supply contract.[126] That said, a buyer may be found to "reinstate" the supply contract by accepting non-conforming shipments without notification of cancellation,[127] perhaps due to attempts to work with the supplier to remedy the human rights impact, particularly where the relationship is "'crucial' to the enterprise."[128]

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120. *Id.* ¶ 5.3(d).

121. *See UNGPs, supra* note 31, princ. 19 & cmt., at 20–21 ("Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.").

122. *See id.* princ. 24 & cmt., at 26 ("[B]usiness enterprises should begin with those human rights impacts that would be most severe, recognizing that a delayed response may affect remediability.").

123. *Id.* princ. 19 & cmt., at 20–22.

124. *Id.* princ. 19 & cmt., at 20–21; *see id.* princ. 24, at 26 (advising businesses to prioritize action when human rights impacts are most severe).

125. *See* U.C.C. § 2-612(3) cmt. 6 (AM. LAW INST. & UNIF. LAW COMM'N 2011) ("Subsection (3) is designed to further the continuance of the contract in the absence of an overt cancellation.").

126. *Id.*; *see* CISG, *supra* note 3, art. 73(2) ("[A] fundamental breach of contract [can] occur with respect to future instalments.").

127. U.C.C. § 2-612(3).

128. *UNGPs, supra* note 31, princ. 19 & cmt., at 20–22. The commentary explains:

The UNGPs make clear that "appropriate action" in response to a human rights impact depends not only on the "leverage" the buyer may have but also upon the complexity and severity of the human rights abuse.[129] Recognizing that the buyer will often work with the supplier that has breached the CHRP obligations, the MCCs seek to confirm that the "[b]uyer's exercise of remedies and the timing thereof" should not be considered a waiver of remedies available for breach of a CHRP.[130] Accordingly, the possibility that a buyer may work with a supplier who has breached a CHRP obligation should not work to the detriment of the buyer.

3. The buyer should have broad rights to withhold payments

The right to withhold payments under the MCCs[131] is an expressly permitted form of default remedy.[132] Yet, again, the default right to withhold payment is not without limitations. There is no general right to a "set-off" and, instead, withholding is limited typically to damages under the "same contract."[133] Challenges to withholding payments

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> Where the relationship is 'crucial' to the enterprise, ending it raises further challenges. A relationship could be deemed as crucial if it provides a product or service that is essential to the enterprise's business, and for which no reasonable alternative source exists. Here the severity of the adverse human rights impact must also be considered: the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship.

Id.

129. *Id.* The commentary details that

> [a]mong the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.

Id.

130. *Model Contract Clauses*, *supra* note 17, ¶ 5.3.

131. *Id.* ¶¶ 5.2, 5.3(e).

132. *See* U.C.C. § 2-717 (specifying that upon notification to the seller, the buyer can "deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due on the same contract"); *id.* § 2-609(1) (permitting a party to "suspend any performance" while waiting for adequate assurances); *id.* § 2-711(1) (allowing buyers to recover amounts paid); *see also* CISG, *supra* note 3, art. 50 (permitting the "buyer [to] reduce the price").

133. U.C.C. § 2-717 cmt. 1; *see* CISG, *supra* note 3, art. 50 ("[I]f the seller remedies any failure to perform his obligations . . . or if the buyer refuses to accept performance by the seller . . . , the buyer may not reduce the price."). A number of cases explore these principles. *See, e.g.*, Reser's Fine Foods, Inc. v. H.C. Schmieding Produce Co., LLC, No. 16-4150-SAC, 2017 WL 4099480, at *6 (D. Kan. Sept. 15, 2017) ("[C]ourts reject setoff defenses based on damages arising from breaches of different contracts."); ITV Direct,

with respect to a breach of a CHRP can be further complicated if the contractual agreement of the parties is "considered separate contracts under the law," such as where the parties have a supply agreement with general terms but use purchase orders with specific terms or differing goods.[134] Moreover, a buyer that attempts to work with the seller to "mitigate the impact" of the human rights abuses may desire to withhold payments during investigations in light of the potential "consequences[—]reputational, financial[,] or legal[—]of the continuing connection."[135] Accordingly, specifying the right to withhold can operate as leverage to obtain remediation of the CHRP violation, as well as provide a monetary remedy.

MCCs provide that a buyer can suspend payments even during investigations and on all contracts, not only the contract under which the seller supplied the non-conforming goods.[136] Including a broadly defined equitable right to withhold payments of the type included in the MCCs addresses both the issue of whether the amounts outstanding to the supplier arise under the same contract in the supply chain and whether the buyer may exercise such a general right to offset at the earliest point of trouble involving CHRP obligations.[137]

4. Buyers should have access to injunctive relief

While the UCC and CISG do not specifically address the extent of access to injunctions and other equitable remedies, these remedies are well established at common law.[138] With respect to injunctions, the MCC appears to reinforce the existing right to seek an injunction.[139] The MCC, though, also communicates that the breach of CHRP

Inc. v. Healthy Sols., LLC, 379 F. Supp. 2d 130, 133 (D. Mass. 2005), *aff'd*, 445 F.3d 66 (1st Cir. 2006) (quoting C.R. Bard, Inc. v. Med. Elecs. Corp., 529 F. Supp. 1382, 1387 (D. Mass. 1982)) (asserting section 2-717 "'is not a general set-off provision permitting a buyer of goods to adjust its continuing contract obligations according to the equities perceived by the buyer.'").

134. J-B Mktg., Inc. v. Golden Cty. Foods, Inc., No. 12-cv-106-bbc, 2013 WL 12109102, at *4 (W.D. Wis. Jan. 31, 2013).

135. *UNGPs*, *supra* note 31, princ. 19 & cmt., at 22.

136. *Model Contract Clauses*, *supra* note 17, ¶ 5.2.

137. *See* U.C.C. § 1-103(b) (providing remedies in "law and equity"); *see also* § 1-305(a) ("[R]emedies . . . must be liberally administered . . . ."); § 2-711 cmt. 3 (same).

138. *See* RESTATEMENT (SECOND) OF CONTRACTS § 357(2)(a) (AM. LAW INST. 1981) (asserting that judicial remedies include injunctions where "the duty is one of forbearance"); *see also UNGPs*, *supra* note 31, princ. 25 & cmt., at 27 (arguing that remedies available to address business related human rights abuses should include "the prevention of harm through, for example, injunctions or guarantees of non-repetition").

139. *Model Contract Clauses*, *supra* note 17, ¶ 5.3(b).

obligations constitute "great and irreparable harm for which [the b]uyer has no adequate remedy at law and that the public interest would be served by injunctive and other equitable relief."[140] This might be key if non-compliant goods are at risk of being sold, resulting in increased damages. Including a specific acknowledgement of access to and availability of injunctive relief also aids the buyer in communicating to the supplier the importance of "grievance mechanisms . . . tak[ing] a range of substantive forms . . . [to] make good any human rights harms that have occurred."[141]

B. Damages Provisions are Consistent with the Principles of Compensation

Professor Peters remarked that buyers cannot "enhance . . . damages in the event of seller[] nonperformance."[142] This observation is consistent with the principles of compensation favoring restoration of parties to their expectancy, the corresponding prohibitions on penalties and the admonition that parties should mitigate their damages.[143] As such, it is not surprising that the MCC provisions on monetary remedies simply state that the buyer is entitled to "damages" in the event of a breach of a CHRP.[144] Likewise, the MCCs further direct that the buyer can recover "all general and consequential damages."[145] This too, however, merely reflects the monetary remedies approach in existing default remedy provisions.[146] Other provisions also reflect the principles of the default remedies,[147] specifically explaining that losses might result from "procurement of replacement [g]oods," "non-delivery of [g]oods," "diminished sales" of goods under the supply contract, other goods sold by the buyer, and damage to the buyer's reputation.[148] Beyond communicating the foreseeability of reputational damages arising from breach of CHRP obligations, the MCCs add little to the collection of damages, in light of the general

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140. *Id.*
141. *UNGPs*, *supra* note 31, princ. 25 & cmt., at 27.
142. *See* Peters, *supra* note 26, at 283; *see supra* notes 92–100 and accompanying text.
143. U.C.C. § 1-305 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 2011).
144. *Model Contract Clauses*, *supra* note 17, ¶ 5.4.
145. *See supra* notes 54–92 and accompanying text.
146. *See supra* notes 54–92 and accompanying text.
147. U.C.C. § 2-711 (index of remedies); § 2-712 (cover damages); § 2-713 (damages for non-delivery); § 2-714 (damages from accepted goods); § 2-715 (incidental and consequential damages); *see also* CISG, *supra* note 3, art. 74–76 (covering all losses, including cover and market based damages); *supra* Part II.
148. *Model Contract Clauses*, *supra* note 17, ¶ 5.4.

notions adverse to penalties.[149] Quite simply, the MCCs cannot meaningfully ease the challenges of proving damages arising from a breach of CHRP obligations, particularly consequential damages to the reputation of the buyer.

The MCC on liquidated damages,[150] however, requires more consideration. The inclusion of specific contract language regarding liquidated damages can take the place of a buyer's claim for reputational and other consequential damages arising from breach of a CHRP.[151] It is well understood that business relationships that negatively impact human rights carry the potential consequences of reputational harm and lost sales across the business.[152] Any attempt to liquidate reputational damages arising from such reputational harm, though, is subject to parameters of "reasonableness" and that the amount "liquidated" is not so large as to be considered a penalty.[153] While liquidating consequential damages, such as those from lost sales, has advantages over proving them at trial, the problem of reputational harm to buyers from negative human rights impacts is serious in a market of "conscious consumerism" where the impact on the buyer's business prospect can be extreme.[154] Yet, what is the optimal way to articulate this type of harm?

The MCCs leave open the amount of, and method for calculation of, liquidated damages arising from breach of a CHRP.[155] Liquidating damages, to reflect a breach of a CHRP that results in impacts on a third party's human rights, is challenging: the non-breaching party suffers reputational damages arising from both the impact on human rights of third parties, typically a supplier's employees who are outside of the direct contractual chain, and the "emotional harm" suffered by conscious consumers who learn of the impacts on the human rights of the third parties.[156] The MCC on liquidated damages recognizes the possibility that the parties can agree to liquidated damages provision,

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149. *See supra* notes 142–48 and accompanying text.

150. *Model Contract Clauses*, *supra* note 17, ¶ 5.4.

151. *See supra* notes 68–75 and accompanying text.

152. *UNGPs*, *supra* note 31, princ. 19 & cmt., at 21–22.

153. *See supra* notes 88–97 and accompanying text.

154. *See* Dadush, *Identity Harm*, *supra* note 13, at 869–81 (explaining the phenomenon of customers paying more for good with values-oriented practices).

155. *Model Contract Clauses*, *supra* note 17, ¶ 5.4, at 1103 n.40 (advising "[p]articular care" in designating liquidated damages due to the limits on enforceability).

156. *See* Ben-Shahar & Porat, *supra* note 13, at 1946, 1950–51 (explaining that the restoration principle can benefit third parties).

which provides that at least part of the recovery takes the form of "restoration damages."[157] The parties could set forth a measure of recovery that, at least partially, benefits the third parties affected who would otherwise be uncompensated if recovery is paid in full to the buyer.[158] That is, the remedy for reputational harm can take a form that remediates the root-cause of the harm to the buyer's reputation: adverse human rights impacts to third parties.[159]

Professors Omri Ben-Shahar and Ariel Porat propose a restoration remedy in their work. Their underlying principles can apply to a liquidated damages clause designed to compensate for breach of a CHRP whereby:

> the wrongdoer is not required to compensate the emotionally aggrieved parties directly or undo the emotional harm. Instead, the wrongdoer has to restore the *underlying interest* that was impaired and gave rise to the emotional harm. The underlying interest is the aggrieved party's plan, agenda, values, or set of preferences that the wrongdoer was obligated to promote or protect.[160]

The restoration remedy identifies the "underlying interest" that causes the harm; in this case, the concern for human rights articulated in the CHRP, which is shared by the buyer, consumers of the buyer's goods and, of course, the affected third parties.[161] Employing a form of restorative compensation through liquidated damages has the potential to avoid the problems of liquidated damages that might overcompensate the buyer (and appear to exact a penalty) by transferring some or all of the recovery to the affected third parties.[162] Moreover, the recovery can help remediate the damage to the buyer's reputation by benefitting human rights in some way, perhaps even the

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157. *See id.* at 1939 n.123 (explaining that victims can be compensated for emotional harm through restoration damages); *see also Model Contract Clauses*, *supra* note 17, ¶ 5.4.

158. Ben-Shahar & Porat, *supra* note 13, at 1939.

159. *See UNGPs*, *supra* note 31, princ. 22 & cmt., at 24–25 (explaining that "[w]here adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so").

160. *See* Ben-Shahar & Porat, *supra* note 13, at 1904.

161. *Id.* at 1915–17.

162. *See id.* at 1938 (reasoning that "directing some punitive damages to nonplaintiffs," such as the third parties actually affected by human rights violations, could have the same effect as restoration damages).

communities impacted by the breach of the CHRP.[163] While measurement of such a restoration remedy might be troublesome for courts, a liquidated damages clause would allow the parties to fix an amount agreed, in advance, to compensate for the types of human rights harm that could damage the buyer's reputation.[164]

Professor Dadush takes a similar position, noting that the remedy for damage to "another's—or many others'—suffering" may require a "different kind of remedy."[165] While Professor Dadush acknowledges that compensation for contractual breach typically takes the form of traditional money damages to the aggrieved party, she also asserts that compensation focused on the "original promise" in the form of "reparations" may better "repair the damage done."[166] Addressing the traditional notion that focuses on recovery of a market value to redress harm, she counters that alternative reparation-oriented "remedies would be beneficial for the consumer, but also for those injured by the broken virtuous promise—e.g., the planet or the people involved in making the identity-harming product."[167] Her position would seem to support an argument favoring a liquidated damages clause that directs compensation to those impacted by human rights abuses in the supply chain because remedies should "address the actual harm-in-the-world created by broken virtuous promises."[168]

These arguments in favor of reconstructing damages for "emotional" or "identity" harms are sound and can be applied to liquidated damages for breach of a CHRP. First, the harm from breach of the CHRP emanates from the impact on human rights in the affected communities. It is the harm to the affected communities that causes emotional or identity harm to consumers who purchase the

163. *See id.* at 1919 (discussing the difficulty of identifying the manner in which to compensate the particular cause affected).

164. *See id.* (positing that measurement of the "intensity of emotional harm" is difficult for courts in the absence of a liquidated damages provision). Professors Ben-Shahar and Porat distinguish cy pres, which focuses on societal goals, and restoration, which compensates for emotional harm. *Id.* at 1936–37.

165. Dadush, *Identity Harm*, *supra* note 13, at 895.

166. *Id.* at 933 (urging that "[i]dentity harm thus demands injunctive relief," which is best achieved by compelling a company to satisfy its human rights pledge).

167. Dadush, *The Law of Identity Harm*, *supra* note 13, at 848.

168. *Id.* at 850 (arguing that the "right measure" of recovery for breach of a promise of an environmentally friendly car would be the "lost greenness of the purchase" with compensation placed in a "climate mitigation fund").

goods.[169] In turn, this collectively leads to damage to the reputation to the buyer, even where the buyer has in place a contractually obligated CHRP and, hopefully, has worked with the supplier to mitigate the impact.[170] Second, the buyer should avoid being seen as benefitting from a supplier's human rights abuse by directly receiving large liquidated damages.[171] Moreover, the parties' agreement to a reasonable liquidated damages clause that provides for the bulk of the remedy to be paid to repair "the underlying [human rights] interest" harmed by the breach, obviates the difficulty courts face in determining reparations.[172] Thus, neither difficulty of determination nor unreasonably large damages resembling penalties should be at issue if the liquidated damages clause directs at least part of the recovery to those affected by human rights abuses.

C. Return, Destruction, or Donation of Goods is Consistent with Mitigation Principles

In some cases, the buyer will have possession of goods that are the subject of broken CHRP promises. What should the buyer do with these goods? This question represents a remaining challenge regarding breach of a CHRP in the supply chain.

The MCCs permit the buyer to store, return, and reship them back to the seller, or, if permitted by applicable law, destroy or donate the goods.[173] Destroying and donating goods tainted by human rights abuses presents two particular issues. First, is destroying or donating goods is consistent with notions disfavoring penalties and favoring

169. *See id.* at 809 (broken sustainability promises produces the most "egregious instances of identity harm").

170. *See UNGPs*, *supra* note 31, princ. 19 & cmt., at 20–22 (illustrating that even when a business integrates its commitments to human rights protections throughout its enterprise, and takes steps to "cease," "prevent," and "mitigate" any adverse human rights impacts, it should be prepared to "accept any consequences—reputational, financial, or legal").

171. *See id.* princ. 17 & cmt., at 17–18 ("As a non-legal matter, business enterprises may be perceived as being 'complicit' in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party.").

172. *See* Dadush, *The Law of Identity Harm*, *supra* note 13, at 851 (quoting Ben-Shahar & Porat, *supra* note 13, at 1905) (arguing that this method is preferable because it provides sincere plaintiffs a mechanism to address intangible harms)).

173. *Model Contract Clauses*, *supra* note 17, ¶ 5.5.

mitigation?[174] Second, will destroying or donating goods prevent damages?[175] Both of these questions are answered in the affirmative.

Most sales of goods cases, whether based on buyer or seller recovery, reject any position that allows for the recovery of consequential damages where there is question as to the aggrieved party's acts in mitigation. For example, in *Packgen v. Berry Plastics Corp.*,[176] the court denied a seller's motion for summary judgment where the seller did not send the buyer a non-conformance report identifying problems with the material until a month after the last purchase order, which suggested a "factual issue as to whether the buyer could have reasonably prevented the [lost profit] damages by cover or otherwise."[177] A similar case arising in the seller's context is *Knitcraft Corp. v. Raleigh Ltd.*,[178] where the seller did not attempt to resell after the buyer's breach, but held the garments in a warehouse for several years and later donated them to charity.[179] The trial court denied the seller's request for recovery of the price, finding that the seller did not mitigate its damages through a reasonable resale.[180]

These cases are correct, but application of the policy varies with respect to supplier's breach of a CHRP and, thereby, the buyer's treatment of the goods. It might appear that actions such as destroying goods or donating them might work as a penalty to a seller who is then unable to recover the goods. It might be argued, then, that the buyer that destroys or donates the goods has failed to act in mitigation and should be barred from recover of at least consequential damages.[181]

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174. U.C.C. § 1-305 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 2011) (stating that this provision is to "make it clear that compensatory damages are limited to compensation"); *see also* CISG, *supra* note 3, art. 77 (parties "must . . . mitigate the loss"); *id.* art. 84 (providing for an accounting of benefits to that the buyer has obtained from the goods).

175. U.C.C. § 2-715 cmt. 2 (stating that consequential damages cannot be recovered if not minimized); CISG, *supra* note 3, art. 77.

176. 113 F. Supp. 3d 371 (D. Me. 2015).

177. *Id.* at 398–99; *see also* Fed. Mogul Corp. v. UTi, U.S., Inc., No. 601271/2010, 2015 WL 3989027, at *8–10 (N.Y. Sup. Ct. July 1, 2015), *aff'd sub nom.* Fed.-Mogul Corp. v. UTi, U.S., Inc., 45 N.Y.S.3d 401 (App. Div. 2017) (continuing to utilize the services of other shipping services was not mitigation caused by Defendant's breach). Although *Federal Mogul Corp.* involved a service contract, the court noted that the mitigation analysis applied was the same as under the Uniform Commercial Code. *Id.* at *8 n.12.

178. No. 49A04-1007-CC-397, 2011 WL 676166 (Ind. Ct. App. Feb. 25, 2011).

179. *Id.* at *1.

180. *Id.*

181. U.C.C. § 2-715 cmt. 2 (AM. LAW INST. & UNIF. LAW COMM'N 2011) (stating that consequential damages cannot be recovered if not minimized); CISG, *supra* note 3, art. 77 (damages are reduced where there is a failure to mitigate).

While destroying or donating the goods might be troublesome in other cases, the buyer will arguably experience increased harm to its reputation if goods tainted with human rights abuses are available in the marketplace. As such, actions preventing goods tainted with human rights abuses from entering the marketplace may work in mitigation of damages, rather than as a penalty to the supplier. Accordingly, actions taken to destroy or donate the goods under the MCCs are consistent with the policies favoring compensation and mitigation.

IV. APPLICATION OF THE MCCS

Part II of this Article demonstrated the measurement and verification problems arising from violations of a contractually obligated CHRP in a supply chain subject to default remedies. These problems result in significant difficulties in the event that a buyer pursues monetary remedies, particularly those related to consequential damages, including damages to reputation. Part III argued that inclusion of specialized remedies provisions, like those in the MCCs, enhance remediation and mitigation of human rights abuses, as well as working in favor of mitigating the buyer's damages. There is a potential to agree to liquidate damages to the buyer's reputation by stipulating a reasonable amount. Moreover, there is an opportunity to address, through a liquidated damages clause, the root cause of the buyer's reputational damage, the adverse human rights impact, by using a "reparations" form of recovery that would benefit adversely affected communities.

Part IV now offers a demonstration of two possible applications of the MCCs on remedies. Returning first to the hypothetical soccer balls stitched by children, this section shows that the basic measure of monetary damages to the buyer on the whole remains unchanged. Application of the MCCs, though, has potential for the buyer's mitigation and remediation of human rights impacts in a way that is "[l]egally [e]ffective and [o]perationally [l]ikely."[182] Moreover, the treatment of goods tainted by human rights abuses provides clarification to the default position on treatment of non-conforming goods.

182. *Model Contract Clauses*, *supra* note 17, at 1094.

A. The Soccer Ball Stitchers

Suppose a commercial seller and buyer make a long-term supply contract for the purchase of soccer balls at $6 per ball.[183] The buyer, located in the United States, has a CHRP as a foundation for all supplier agreements, to which all suppliers must adhere. The CHRP, among other provisions, includes standards for leadership, prohibits labor by those under the age of sixteen, and remedies provisions of the type drafted in the MCCs.[184] The supply contract includes liquidated damages for violations of the CHRP. The damages are calculated to represent the anticipated annual profit from the supply contract, and, the liquidated damages will be paid to one or more entities, protecting children and trafficked persons, designated in the supply contract.[185]

After arrival of the soccer balls, the buyer discovers that the seller, located in Pakistan, is employing ball stitchers who are under the age of sixteen and as young as ten years old. Moreover, due to this pervasive use of child labor, the buyer experiences negative news coverage, lost sales, and reputational damages.[186]

The MCCs provide the buyer several remedial options short of cancellation and damages, which are both available in full. The first step may likely be an investigation to determine what response is

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183. *See supra* notes 15–16 and accompanying text. While there is history of human rights abuses in the sporting goods industry, including child stitchers of soccer balls, FIFA banned use of child labor in 1998. *See* Jessica Phelan, *6 Times Human Rights Were Violated in the Name of Soccer*, PRI (May 29, 2015, 4:15 AM), https://www.pri.org/stories/2015-05-29/6-times-human-rights-were-violated-name-soccer (explaining a 1996 study that discovered "more than 7000 children . . . stitching soccer balls full time," which forced FIFA to adopt a "code of conduct banning the use of child labor by its contractors and subcontractors"). *But see* Annabel Symington, *One Man's Dream Comes True: Making the Official Ball for the 2014 FIFA World Cup*, PRI (Apr. 24, 2014, 7:23 AM), https://www.pri.org/stories/2014-04-24/one-mans-dream-come-true-making-official-ball-2014-fifa-world-cup (noting that child labor in problematic in Pakistan and that it is difficult to determine sometimes which goods are the product of child labor). The particular soccer ball scenario in this Article is hypothetical and not related to any particular sporting goods company.

184. *See supra* Part III and accompanying text.

185. This Article takes no position on the precise calculation of liquidated damages, holding that discussion as part of the research agenda of another article discussing more fully the underpinnings and challenges of liquidating damages in the human rights context. The one-year profits are used for illustration only.

186. *See* Dadush, *The Law of Identity Harm*, *supra* note 13, at 842–44 (discussing consumer lawsuits brought against companies purportedly undertaking human rights protections and arguing that misleading statements to such effect may be the basis for later consumer claims).

appropriate.[187] The MCCs provide the buyer with the right to withhold payments on the supply contract at this point, which is earlier than may be permitted under the default provisions.[188] To the extent the relationship is one the buyer believes it can remediate, the right to demand termination of the child workers, supervisors, and others can provide leverage over suppliers.[189] Similarly, in the event that trouble emanates from a particular subcontractor in the supply chain, the buyer would have the ability to insist that the seller terminate that supply chain to remediate the human rights impact.[190] The buyer would have access to injunctive relief in response to risk of future breaches, sales of the tainted goods or the like.[191]

In the event that initial equitable remedies prove insufficient toward remediation, the MCCs preserve several options to the buyer. The buyer could claim damages for purchasing other soccer balls or market-based damages.[192] For instance, if replacement soccer balls cost $8 per ball, the buyer could recover the difference between the cover price of $8 and the contract price of $6, for a differential of $2 per ball. Similar analysis would apply if the buyer does not cover and the market price for balls is $8, such that the buyer could recover $2 per ball again. This result is arguably the same as would occur under the default provisions of Article 2 in light of the prohibitions on penalties that guard against the enhancement of the buyer's damages.[193]

There are two primary differences with the application of the MCCs arising from breach of the CHRP in the soccer ball contract: liquidated damages[194] and duties with respect to the goods.[195] First, the MCCs would operate here to stipulate damages for reputation keyed to the amount of annual profits under the contract, and would be payable to a designated group in the community affected by the breach

187. *Model Contract Clauses*, *supra* note 17, ¶ 5.2. The buyer can also demand adequate assurances from the supplier. *Id.* ¶ 5.3(a); *see also UNGPs*, *supra* note 31, princs. 18–19, at 19–22 and accompanying commentary (noting that determining the appropriate action includes an evaluation of the relationship, whether leverage is available and whether termination is needed).

188. *Model Contract Clauses*, *supra* note 17, ¶ 5.2; *see supra* Part II and accompanying text.

189. *Model Contract Clauses*, *supra* note 17, ¶ 5.3(c).

190. *Id.* ¶ 5.3(d).

191. *Id.* ¶ 5.3(b).

192. *Id.* ¶¶ 5.3(g), 5.4; *see supra* Part III and accompanying text.

193. *See supra* Part II and accompanying text.

194. *Model Contract Clauses*, *supra* note 17, ¶ 5.4; *see supra* Part III and accompanying text.

195. *Model Contract Clauses*, *supra* note 17, ¶ 5.5; *see supra* Part III and accompanying text.

of the CHRP, such as Child Rights Connect,[196] UNICEF,[197] or Humanium.[198] Second, the buyer has the limited duty with respect to the goods. In the case of the soccer balls, they likely bear a trademark of the buyer upon delivery, such that return might not be the preferred option. The buyer in this case may likely choose to destroy the soccer balls or donate them (likely with a special mark) to mitigate damages to its reputation if the goods enter the marketplace.

Analyzing whether the liquidated damages provision would be void as a penalty in the soccer balls hypothetical turns on reasonableness of the amount.[199] Why would the parties agree to liquidated damages tied to the annual profit under the contract with recovery paid to affected communities, rather than to the buyer itself? The reason would seldom be to confer some type of windfall on the buyer beyond the actual loss to the buyer's reputation from the breach of the CHRP; parties normally do not make contracts with this in mind.[200] Rather, the typical purpose of these parties making the contract is the supply of the soccer balls, with the understanding that the CHRP mandates the supply be done without negative human rights impacts.

With this in mind, it would be likely that the parties would enter into a liquidated damages stipulation in an amount linked in some way to profit under the contract. Damages measured in this way would seek to remedy the precise type of harm caused by the breach of the CHRP, which, in turn, caused reputational and other damages to the buyer. The buyer, for its part, could be persuaded to enter into this type of liquidated damages provision, since: (1) the buyer has already made a commitment to protection of human rights through adoption of the

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196. *See* CHILD RTS. CONNECT, https://www.childrightsconnect.org (last visited June 1, 2019) (working with national, regional and international groups).

197. *See*, *What We Do*, UNICEF, https://www.unicef.org/pakistan/what-we-do (last visited June 1, 2019) (conducting operations in Pakistan).

198. *See Children of Pakistan*, HUMANIUM, https://www.humanium.org/en/pakistan (last visited June 1, 2019) (working in Pakistan).

199. U.C.C. § 2-718(1) (AM. LAW INST. & UNIF. LAW COMM'N 2011); *see* CISG Advisory Council Opinion No. 10, *supra* note 57, cmt. 4.2.2.; *see also* Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717, 731 (2000) (finding that contracting parties are actually too optimistic on the success of the venture to bargain for an "effective liquidated damages provision").

200. *See* Hillman, *supra* note 199, at 733 ("The parties' focus on achieving a 'fair' exchange and their aversion to windfalls and penalties also may point to enforcement of agreed remedies."); *see also* Ben-Shahar & Porat, *supra* note 13, at 1911–12, 1912 n.47 (observing that when strong "emotional interest[s]" are written into contract provisions, they "render[] damages inadequate" and "hard-to-measure").

CHRP;[201] (2) the buyer has implemented the CHRP's policy commitment into specific action with the MCCs;[202] and (3) the buyer may suffer additional damage to its reputation if it is "seen to benefit from an abuse committed" by another party.[203] Moreover, by not retaining the recovery from the liquidated damages, the buyer has not received any windfall or exacted a penalty from the seller.

Similarly, a decision to destroy or donate the soccer balls should be defensible. Decisions of a contracting party that deprive the other party of the goods can expose the non-breaching party to arguments that its damages should be limited due to a failure to mitigate.[204] The buyer's action in donating or destroying goods tainted by human rights abuses may be considered an action in mitigation of damages. First, a buyer faced with reputational damages arising from the seller's breach of the CHRP will, presumably, suffer increased damages if the tainted goods enter into the marketplace. There, conscious consumers will not be able to distinguish which goods of the seller are tainted and which are not, particularly if the balls bear the buyer's trademarks. Second, a seller would not suffer a penalty if the buyer donating or destroying the goods actually reduces the amount of damage to the buyer.

In short, inclusion of provisions, such as the liquidating damages clause and permitting the destruction of the goods, do not indicate that a penalty may arise for one party or that a party has failed to mitigate its damages. Rather, the buyer would have measures available to mitigate damages and remediate adverse human rights impacts in the supply chain. Damages in the case of the soccer ball stitchers would be based on an amount necessary to compensate the buyer's general expectation damages and result in mitigation of reputation and human rights harms. This would be true even where at least part of the recovery under a liquidated damages provision is paid to causes benefitting the affected communities, as this can be seen as mitigation of the buyer's reputational harm (as well as mitigating harm to value-conscious consumers). This measure of damages would be consistent with the notion of permitting alteration of damages that do not enhance recovery or act as penalties.

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201. *See UNGPs*, *supra* note 31, princ. 15 & cmt., at 15–16; *see supra* notes 55–59 and accompanying text.

202. *See UNGPs*, *supra* note 31, princ. 15 & cmt., at 15–16.

203. *Id.* princ. 17 & cmt., at 17–18.

204. *See supra* notes 70, 143, 170 and accompanying text.

Consider now the following hypothetical to examine whether this position holds true in a transaction where the human rights abuse affects the whole goods but arises from the acts of only one supplier in the chain.

B. The Cell Phone Component

Suppose a commercial seller and buyer make a long-term supply contract for the purchase of cell phones at $400 per phone. The buyer, located in the United States, has a CHRP as a foundation for all supplier agreements, to which all suppliers must adhere. The CHRP, among other provisions, includes standards for leadership, prohibits trafficking in persons and labor by those under the age of sixteen, and remedies provisions of the type drafted in the MCCs.[205] The supply contract includes liquidated damages for violations of the CHRP calculated in an amount representing the annual profit on the supply contract. The contract specifies that any recovery of liquidated damages will be paid to one or more entities protecting children and trafficked persons designated in the supply contract.

After arrival of the cell phones, the buyer discovers that the batteries in the phones contain cobalt that was mined by trafficked persons and children in the Congo. The cobalt was supplied by a single supplier in the supply chain several steps removed from the seller. The buyer is faced with unfavorable news coverage, lost sales of phones and other electronics it produces, and damage to its reputation due to the use of trafficked and child labor in its supply chain.[206]

Much of the same analysis can be made here as in the soccer ball stitchers hypothetical in terms of access to non-monetary and monetary remedies, with two primary differences. First, if the buyer is unable to work with the seller to eliminate the human rights abuses of the supplier, the MCCs provide the buyer with the leverage to force the termination of the subcontract, which is the point of the CHRP breach. Second, while donation or destruction seemed to be the probable treatment of tainted soccer balls, with the cell phones there may be the opening to return the goods to the seller for remediation of the goods to eliminate the parts that contain the cobalt. The MCCs provide the buyer with traditional monetary damages, but the

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205. *See supra* Part III and accompanying text.

206. *See* Dadush, *The Law of Identity Harm*, *supra* note 13, at 809–10 (discussing consumer lawsuits brought against companies purportedly undertaking human rights protections and arguing that misleading statements to such effect may be the basis for later consumer claims).

flexibility of the non-monetary damages and the treatment of tainted goods may provide clarity in the event of a CHRP violation.[207]

CONCLUSION

Access to contractual remedies under the expectation interest applies equally to breaches of CHRP that parties implement in the supply chain by operative contractual obligations. More specifically, the aggrieved party's access to a contractual remedy upon discovery of human rights abuses and impacts in the supply chain depends upon whether a buyer has not only adopted a CHRP but also has made it contractually obligated in the supply chain, typically through representations and warranties. One purpose of this Article has been to explore the reach of contractual remedies for human rights abuses in the supply chain and the need to put basic corporate policy into action so that buyers in the supply chain are not complicit in human rights abuses.

This Article has attempted to show that there are sufficient consequences that follow a breach of contractually obligated CHRP in terms of preservation of a remedy to the aggrieved buyer. First, exploring the application of Article 2's default remedial structure and its limitations on the expectation interest and consequential damages should lead to a better understanding of why a buyer desiring to implement its CHRP in the supply chain should prefer to alter the default remedies. Second, this Article evaluates the MCCs, demonstrating where the clauses resolve limitations under Article 2's default rules and where they do not. The Article emphasizes that there is little to enhance the recovery by a buyer arising from breach of a CHRP and suggests the possibility of avoiding characterization of

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207. This Article has demonstrated that the MCCs are compliant with the default rules of the UCC and CISG, and provide specialized solutions with flexibility to contracting parties in a format that makes the provisions "legally effective and operationally likely." *Model Contract Clauses*, *supra* note 17, at 1094. Yet, there is much here that is the basis for my next article looking more closely at the use of liquidated damages as part of the enforcement of CHRPs. That piece will explore the remedial principles of contract law to further outline how liquidated damages can be used as a private law remedy for human rights abuses. It will explain how parties might determine the amount of liquidated damages, why buyers should not attempt to cast clauses for breach of a CHRP as "alternative performance" provisions, and recommend approaches to CHRP violations, particularly where both parties might contribute to the CHRP violation. This involves the potential for at least a portion of any such damages to flow through to those harmed by CHRP violations. But, as set out in this Article, buyers should not be perceived as profiting from human rights abuses.

liquidated damages as penalties by providing a form of reparations to communities harmed by human rights impacts in the supply chain.

This Article strives to present a balanced application of remedial contract clauses, whether those presented in the MCCs or not, that preserves the aggrieved buyer's right to elect its remedy in most cases, subject to a limit on the buyer achieving the position equivalent to full contractual performance only. To the extent that selection and drafting of remedial provisions implementing a CHRP in a supply chain contract depend upon an understanding of the expectation interest without falling victim to common limitations related to windfalls, mitigation, penalties, and the like, it is hopeful that this Article will aid in the recourse to remedies generally and the assessment of damages in the instance of a supplier's violation of a contractually obligated CHRP.